STATE OF MICHIGAN
IN THE COURT OF APPEALS

KEITH W. MAYBERRY and
JOANNA MAYBERRY, his wife

Plaintiffs/Appellants,

Supreme Court No. 126136
Court of Appeals No. 244162
Lower Case No. 02-039236-NH

V

GENERAL ORTHOPEDICS, P.C.,
A Michigan Professional Corporation,
And WILLIAM M. KOHEN, M.D., Jointly
And Severally.

Defendants/Appellees.
_____/

JOSEPH L. KONHEIM (P34317)
JOSEPH J. CEGLAREK, II (P56791)
Attorneys for Plaintiffs/Appellants
15815 W. 12 Mile Rd.
Southfield, MI 48076-3043
(248) 552-8500/Fax 1249

JAMES M. PIDGEON, P.C.
JAMES M. PIDGEON (P26799)
Attorney for Defendants/Appellees
3250 W. Big Beaver, Ste 232
Troy, MI 48084
(248) 649-6500/Fax 5600
_____/

126136

DEFENDANTS/APPELLEES' SUPPLEMENTAL BRIEF AS REQUESTED BY ORDER OF THIS COURT PURSUANT TO MCR 7.302

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ORDERS APPEAL FROM JURISDICTION AND RELIEF SOUGHT

Defendants accept the Statement of Orders Appealed from Jurisdiction and Relief Sought by the Plaintiffs but for the fact that the Defendants/Appellants request that the Court of Appeals be affirmed and the Application for Leave be denied.

QUESTIONS PRESENTED FOR REVIEW

QUESTION 1: Does a Notice of Intent filed when more than 182 days remain in the limitation period have the effect of tolling the period of limitations by operation of MCL 600.5856(d)?

QUESTION 2: Does the prohibition against tacking successive 182 day periods apply when the first notice period has expired and when fewer than 182 days remains in the limitation period upon the filing of subsequent notice of intent?

QUESTION 3: Does a second notice of intent serve the toll statute of limitations when it is served with less than 182 days under the period of limitations?

STATEMENT OF FACTS

The Defendants/Appellees accept the statement of facts as set forth by the plaintiffs/appellants for purposes of this appeal only, this acceptance not intended constitute any admission of negligence, proximate cause, or damages.

STANDARD OF REVIEW

Defendants/Appellees accept the standard of review set forth by the plaintiffs/appellants.

LAW AND ARGUMENT

ISSUE I

Does a Notice of Intent filed when more than 182-days remain in the limitations period have the effect of tolling the period of limitations by operation of MCL 600.5856(d)?

Defendant contends to answer this question as **"No"**.

Per MCL 600.5856(d), now MCL 600.5856(c), the service of a Notice of Intent to File Claim has no effect on the Statute of Limitations when served with more than 182 days remaining within the statutory period.

This is due to the fact that the tolling provision provided by MCL 600.5856(d) is conditioned upon the expiration of the Statute of Limitations within the notice period required by MCL 600.2912(b).

The plain language of MCL 600.5856(d) provides that tolling occurs "if during that period (the notice period under §600.2912b) a claim would be barred by the Statute of Limitations or repose."

In the instant litigation, the claimed malpractice is alleged to have occurred in November 1999, meaning that the two-year Statute of Limitations applicable to medical malpractice actions would have run in November of 2001.

The initial Notice of Intent was served on June 21, 2000, meaning that the waiting period would have run sometime in January of 2001.

Since the claim would not have been barred by the Statute of Limitations during the waiting period imposed by MCL 600.2912b, the tolling provision provided by MCL 600.5856(d)is not invoked.

This Court already decided that particular issue in ***Omelenchuk vs. City of Warren, 461 Mich 567; 609 NW2d 177 (2000)***, when it compared the joint effect of the two statutes involved here, MCL 600.2912b,(providing for the waiting period), and MCL 600.5856(d) (providing for a tolling provision).

This Court concluded:

> If the interval when a potential plaintiff is not allowed to sue ends before the limitation period ends (i.e., if notice is given more than 182-days before the end of the limitation period), then MCL 600.5856(d); MSA 27A.5856(d) is of no consequence. In that circumstance, the limitation period is unaffected by the fact that, during that period, there occurs an interval when a potential plaintiff cannot file suit.
>
> If, however, the interval when a potential plaintiff is not allowed to file suit would end after the expiration of the limitation period (i.e., if notice is given 182 days or less before the end of the limitation period), then MCL 600.5856(d); MSA 27A.5856(d) applies. In that instance, the limitation period is tolled.
> *Omelenchuk, Supra at 574."*

Therefore, there is no effect on the statutory period of limitations when a Notice of Intent has been filed when more than 182 days remain in the limitation period applicable to the medical malpractice issue in question, and, therefore, the medical malpractice action brought against Dr. William Kohen was appropriately dismissed.

ISSUE II

Does the prohibition against tacking successive 182 day periods apply when the first notice period has expired and when fewer than 182 days remain in the limitation period upon the filing of a subsequent Notice of Intent?

The defendants/Appellees contend that the answer to this question is **"Yes"**.

The answer clearly is yes if the word "successive" is intended to refer to subsequent notices of intent.

The answer, of course, would be "no" if the Legislature intended that subsequent notices of intent be "successive" in order for the prohibition to apply.

A literal interpretation of the word "successive" would mean that the prohibition against tacking successive periods would only apply if a 182 day waiting period expired on a Wednesday, and a potential plaintiff filed a Second Notice of Intent on Thursday, the next day. Such would not be allowed in

light of the prohibition against tacking "successive" 182 day periods.

With that interpretation in mind, and there existed 180 days left on the Statute of Limitation at the time of the initial Notice of Intent was filed, however, and rather than filing a Second Notice of Intent on Thursday the potential plaintiff waited one additional day, and filed the Second Notice of Intent on Friday, such would mean that the Statute of Limitations could be extended for almost 90 years.

MCL 600.5856(d) provides that the Statute of Limitations is tolled when a §2912b Notice is filed "if during that period a claim would be barred by the Statute of Limitations or repose."

If the first Notice of Intent, by way of the example above, was issued when there remained only 180 days on the Statute of Limitations, and by waiting until Friday to file the Second Notice of Intent rather than filing it immediately, and therefore "successively", on Thursday, after the first Notice of Intent had expired on Wednesday, there would be only 179 days left to run on the statute. The tolling provision provided by MCL 600.5856(d) would again begin to run. This would leave an unexpired 179 days under the original Statute of Limitations upon the expiration of the Second Notice of Intent. After the Second Notice of Intent expired, and after waiting yet another

day, a third, "non-successive" Notice of Intent could be filed, leaving 178 days yet to run after the expiration of the third notice.

Under the plaintiffs' interpretation of the word "successive" such would mean that, by waiting one day after the expiration of each sequential Notice of Intent, the 182 day tolling provision could be invoked 180 times. That interpretation converts to a period of time in excess of 89 years that the Statute of Limitations could be tolled in a "non-successive" manner by the filing of serial Notices of Intent.

This is because subsequent Notices of Intent filed serially, with one day separating them would no longer be "successive", but merely subsequent and each subsequent Notice of Intent would use up only one day of the 180 days left under the Statute of Limitations before the filing of each additional Notice of Intent.

Although the plain meaning of the statute as argued by the plaintiff in this matter would suggest that the term "successive" means exactly that, that is one following the other without any break in time, such an interpretation leads to an absurd result.

As this Court stated in ***Owendale Schools v. State Board of Education, 413 Mich 1; 317 NW2d 529 (1982):***

> Legislative intent controls statutory construction and, ascertaining such intent, the Legislature must be presumed to have intended the meaning expressed by the language it has chosen. When that language is clear and unambiguous, no further interpretation is necessary. ***Dussia v. Monroe County Employee Retirement System, 386 Mich 244; 191 NW2d 307 (1971); City of Grand Rapids v. Crocker, 219 Mich 178; 189 NW2d 221 (1922).***
>
> There is, however, an exception to this fundamental rule of statutory construction that arises when a literal reading of the statutory language "would produce an absured and unjust result and would be clearly inconsistent with the purposes and policies of the the act in question."
> ***Owendale Schools Supra at 8.***

To interpret the "successive" in the manner suggested by plaintiff could lead to situations where all of the principals are long since dead prior to actual commencement of the litigation which would not be barred by the Statute of Limitations due to the invocation of 180 sequential, but non-successive waiting periods.

ISSUE III

Does a Second Notice of Intent serve to toll the Statute of Limitations when it is served with less than 182 days remaining under the period of limitations?

Defendant contends to answer this question is **"No"**.

This Court was presented with an identical issue upon the Application for Leave to Appeal in the case of ***Orta v. Health***

One Medical Center, 467 Mich 864; 651 NW2d 912 (2002), and found the issued not worthy of review.

As addressed in the Unpublished Court of Appeals Opinion in the same case, ***Orta v. Health One Medical Center***, *2002 WL 236025, (Mich App, Unpublished)*, the claim of malpractice occurred in the Spring of 1997, and the Court of Appeals determined that the Statute of Limitations on the claim ran on May 8, 1999.

The initial Notice of Intent was filed on August 24, 1998, and the 182 day waiting period, therefore expired on February 22, 1999.

Per ***Omelenchuk v. Warren, Supra***, since the tolling provision provided by MCL 600.5856(d) was deemed to be inapplicable, the Court of Appeals determined that:

> "Neither the fact that not all potential defendants were included in the Notice of Intent, nor the fact that plaintiffs served a Second Notice of Intent in March, 1999, allow plaintiffs to claim an additional 182 day waiting period before filing suit. MCL 600.2912b(6)."

Orta, Supra at 2.

Likewise, the Michigan Court of Appeals in the case of ***Ashby v. Byrnes, 251 Mich App. 537; 651 NW2d 922 (2002),*** resolves this issue.

In ***Ashby, Supra***, the Court of Appeals, in addressing the effect of the Plaintiff's Amended Notice of Intent stated:

"Plaintiffs' second argument on appeal is that it was sufficient that they filed an Amended Notice of Intent to file a malpractice claim during the 30 day grace period (provided by the bankruptcy code). In effect, plaintiffs' argue that they should have been allowed an additional 182 day period filing of that Amended Notice in which to file their Complaint. We disagree.

MCL 600.2912b(6), states:

> After the initial notice is given to a health professional or health facility under this section, the tacking or addition of successive 182 day periods is not allowed, irrespective of how many additional notices are subsequently filed for that claim and irrespective of the number of health professionals or health facilities notified.

We find plaintiff's arguments against applying this clear statutory language here to be unpersuasive.

First, plaintiff argue that the statute does not apply because, under the facts of this case, their initial filing of a Notice of Intent did not effectively result in any tolling of the period of limitation. Plaintiff's note that the period had not expired before defendants, through their insurance carrier, denied plaintiff's claim. Thus, plaintiffs argue, they received no benefit from the statute granting them a tolling of the running of the limitation period following the filing of their initial Notice of Intent. However, although we recognize that §2912b(6) specifically proscribes only the tacking or addition of "successive" periods, the overall intent of the language of the statute is clearly that only "the initial notice" results in the tolling of the limitation period "irrespective of how many additional notices

> are subsequently filed." The statute nowhere suggests that this limiting language applies only when the first notice filing tolled the period of limitations.
>
> Second, plaintiffs argue that their Amended Notice of Intent did not pertain to the same claim referenced in their initial notice because they added an additional theory of liability against defendants. Thus, plaintiff argued that the language of the statute regarding "notices…subsequently filed for that claim" is not applicable. Again, we disagree with this constricted reading of the statute. By its terms, the statute would clearly apply to an additional notice that added other "health professionals or health facilities" to a claim originally noticed against an individual "health professional or health facility." If that is the case, which it clearly is, we cannot construe the statute to be inapplicable when a notice really alleges additional theories of liability against an already named defendant.

Ashby, supra at 544-545.

All of the above seems to leave a potential plaintiff in something of a quandary when discovery of a second defendant occurs after the initial Notice of Intent is served upon one of the potential defendants.

MCLA 600.2912b(3), addresses that situation when the conditions set forth in that subsection are all met, essentially requiring that other health professionals have already been notified, 182 day notice period has expired, a Complaint has already been filed with the court, and the plaintiff had not and

could not reasonably have identified the health professional to whom a notice should have been sent prior to filing a Complaint.

In this case, however, the thought of bringing suit against the professional corporation of Dr. Kohen apparently did not occur until a second set of attorneys took over the case. Mr. Mayberry, by the terms of the Complaint that was filed in this case had visited the offices of Dr. Kohen who practices under the name of General Orthopedics, PC. Therefore, prior to filing the Complaint in this case, the plaintiff knew that General Orthopedics was a potential defendant, and in fact had served General Orthopedics with the Amended Notice of Intent. Therefore, the fourth prong of MCL 600.2912b(3) could not possibly have been satisfied.

Thus, in order to bring all potential defendants into a future medical malpractice action, the "initial notice" must identify those potential defendants and provide each with the proper notice required by MCL 600.2912b.

Such a requirement is no different than was required prior to the existence of the Malpractice Reform Statute, and places no greater of burden on the plaintiff than previously was in existence.

In ***Walerych v. Isaac, 63 Mich App. 478; 234 NW2d 573 (1975)***, the Michigan Court of Appeals directly addressed the

issue of a subsequently discovered defendant in applying the then existing "discovery rule."

In ***Walerych, supra,*** the plaintiff misread the signature of the doctor on a set of hospital records, and brought suit against several physicians. Two and a half years after the initial Complaint was filed, the plaintiff amended her Complaint to allege that a different physician than those named previously was responsible for the damages she claimed to have suffered. The plaintiff sought to explain the late amendment to name the additional physician by claiming that she could not have "discovered" the identity of the newly added physician until shortly before the next amendment to the Complaint took place. She, therefore, claimed that she timely filed her Complaint within two years of the date of the "discovery" of the newly added physician under the rule set forth by the Supreme Court in the case of ***Dyke v. Richard, 390 Mich 739: 213 NW2d 185 (1973).***

In ruling that the discovery rule did not apply to cases involving a claimed inability to identify a potential defendant, the Court of Appeals stated:

> Implicit in the Supreme Court's Opinion in ***Dyke, Supra,*** is the recognition that in the area of malpractice there is often difficulty in determining whether a wrong has occurred. Great lengths of time may pass before the results of professional errors become apparent to laymen. The Court felt that to bar an action before a person

> even knew that he might have a cause of action would be unreasonable.
>
> Plaintiff in this case knew by at least December of 1971, that there might be a cause of action against certain physicians. Plaintiff's action against defendant was instituted more than two years from that date. We are unwilling to hold that ***Dyke v. Richard, Supra***, applies here. The issues of professional knowledge and reasonableness are not present. Discovery of the identity of an alleged tortfeasor is no more difficult when the wrong alleged is malpractice.

Walyrick, supra at 480-481.

In essence, the tolling provision provided by MCL 600.5856(d) precludes the expiration of the Statute of Limitations when the <u>original</u> Notice of Intent is served with less than 182 days remaining on that limitation period.

It is required that a plaintiff take the steps necessary to identify all potential defendants, as required in ***Walyrick, Supra***, as of the time that the original Notice of Intent is sent out no matter whether the plaintiff is entitled to the tolling provision provided by MCL 600.5856(d), or not.

If the Malpractice Reform Statute did not exist, and the plaintiff saw fit to name a potential defendant more than two years after the alleged cause of action accrued, the outcome that would have occurred would be no different than that which occurred in this case.

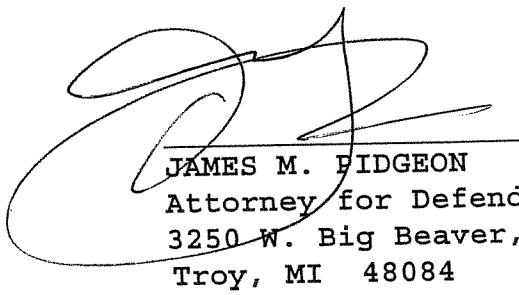
RELIEF SOUGHT

PRAYER

WHEREFORE, the Defendants/Appellees respectfully pray that this Court deny the Plaintiffs' Application for Leave to Appeal.

Respectfully submitted,

JAMES M. PIDGEON, P.C.



JAMES M. PIDGEON
Attorney for Defendants/Appellees
3250 W. Big Beaver, Ste 232
Troy, MI 48084
(248) 649-4300

Dated: February 13, 2005.

PROOF OF SERVICE

JAMES M. PIDGEON, being first duly sworn, deposes and says that he did serve the following document(s) in the manner herein specified:

DOCUMENT(S): **1. Defendants/Appellees' Suuplemental Brief as Requested by Order of this Court Pursuant to MCT 7.302.**

2. Proof of Service.

DATE SERVED: **February 14, 2004.**

PERSON(S) SERVED: Michigan Supreme Hall of Justice
925 W. Ottawa
44HOJ
Lansing, MI 48915

Joseph Konheim, Esq.
15815 W. 12 Mile Road
Southfield, MI 48076

Clerk, Oakland County Circuit Court
1200 N. Telegraph Road
Pontiac, MI 48341

Clerk of the Court of Appeals
P.O. Box 30022
Lansing, MI 48909

MANNER SERVED: **Hand-Delivered**

James M. Pidgeon